

Chapter 12 - The Law of the State

1. The law of the state is the body of rules and regulations which govern the conduct of the people of the state. It is the law which is binding on all the people of the state, and it is the law which is enforced by the state.
2. The law of the state is the law which is binding on all the people of the state, and it is the law which is enforced by the state.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1972

Nos. 72-269, 72-270, 72-271

ARTHUR LEVITT, as Comptroller of the State of New
York, and EWALD B. NYQUIST, as Commissioner of
Education of the State of New York,
Appellants,

VS.

COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS
LIBERTY ET AL., *Appellees;*

EARL W. BRYDGES, as Majority Leader and President
pro tem of the New York State Senate, *Appellant,*

VS.

COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS
LIBERTY ET AL., *Appellees;*

CATHEDRAL ACADEMY ET AL., *Appellants,*

VS.

COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS
LIBERTY ET AL., *Appellees.*

On Appeal from the United States District Court for the
Southern District of New York

**BRIEF FOR APPELLANTS BAIS YAAKOV
ACADEMY FOR GIRLS AND YESHIVAH RAMBAM**

OPINION BELOW

The majority and dissenting opinions of the three-judge district court are reported at 342 F.Supp. 439.

JURISDICTION

The district court filed its final order and judgment permanently enjoining the implementation of chapter 138 of the New York Laws of 1970 on June 1, 1972 (App. 94a). Appellants Bais Yaakov Academy for Girls and Yeshivah Rambam filed a notice of appeal to this Court on July 10, 1972, and their Jurisdictional Statement on August 18, 1972. Probable jurisdiction was noted on November 6, 1972 (App. 120a-121a). The jurisdiction of this Court rests on 28 U.S.C. 1253.

STATUTE INVOLVED

The New York Mandated Services Act, chapter 138 of the New York Laws of 1970, appears in the Appendix to the brief for appellants Levitt and Nyquist at pages A1-A5.

QUESTION PRESENTED

Whether the Establishment Clause of the First Amendment is violated by a state statute which provides reimbursement to nonpublic schools for the costs of record-keeping and other administrative services which are entirely collateral to the educative function, are made obligatory on the schools by state law, and are designed to fulfill the State's duty to examine and inspect such schools.

STATEMENT

This case concerns a law enacted in 1970 by the New York State Legislature for the purpose of reimbursing nonpublic schools "for expenses of services" for a variety of administrative tasks "provided for or required

by [state] law or regulation." The law—commonly known as the Mandated Services Act—authorized appropriations to cover the costs of "examination and inspection" in connection with the administration of certain student achievement tests, the "maintenance" of enrollment, attendance, and health records for students, the "recording" of personnel qualifications and the "preparation and submission" of required reports to State agencies. The constitutionality of the law was challenged by the appellees, and a three-judge district court (Hays, C. J., and Lasker and Palmieri, D. J.), by a 2-to-1 vote, determined that it violated the Establishment Clause of the First Amendment as applied in this Court's recent decision in *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

The majority of the three-judge court held that the only significant difference between the Pennsylvania statute held impermissible in *Lemon* and the present law was "that reimbursement was permitted under the Pennsylvania law principally for teaching, whereas here it is allowed primarily for testing." 342 F.Supp. at 443. That distinction, said the majority below, is "insufficient to avoid the rule of *Lemon-Earley*." *Ibid*. The majority also relied on its predictions that administration of the law would "sooner or later" result in "the type of surveillance and controls which the *Lemon* Court found to foster excessive entanglement" (*id.* at 444) and that this form of state assistance "will result in the aggravation of divisive political activity on the part of supporters and opponents of the annual appropriation legislation" (*id.* at 445). The dissenting judge (Palmieri, J.), noted "that the sums appropriated by the legislature to assure attendance and adequate examination procedures are much less than the

schools expend for this purpose." He found "neither entanglement nor involvement between church and state" and would have dismissed the complaint (*id.* at 445-446).

ARGUMENT

I

REIMBURSEMENT FOR NONEDUCATIVE ADMINISTRATIVE SERVICES IMPOSED ON A SCHOOL TO FACILITATE STATE SUPERVISION OF EDUCATION DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE

The statute being challenged in this case provides for payments to be made directly from the public treasury to nonpublic schools—including, to be sure, some which perform religious functions and impose on their students religious restrictions and requirements. The majority of the court below did not look beyond this superficial similarity to the statute invalidated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and struck down this law because it decided that this case, like *Lemon*, involves "financial assistance paid directly to the church-related school." 342 F.Supp. at 443.

In so doing, the majority below ignored the nature, purpose and effect of the State's payment. Unlike *Lemon*, this case concerns reimbursement for administrative services which are peripheral to the educative function of a school. The maintenance of accurate attendance rolls and health records is obviously not an essential part of the education of a school's students. Such records may be useful, in various ways, to a school's administrators, but they are mandatory *only* because they are indispensable to state officials who supervise a state's educational system and are responsible to enforce laws against truancy and regulations governing the health of children.

The same is obviously true of a standardized student evaluation and testing system. Schools can educate their children capably and efficiently without administering state-wide examinations or even giving locally-developed tests whose results are reported to state officials. The purpose of such a testing program is to assist the State in evaluating the performance of non-public schools, not directly to benefit the students or those who guide the schools.

Contrary to the views of the majority below, there is, therefore, a great difference between reimbursement "principally for teaching" and reimbursement "primarily for testing." Teaching is the very essence of education; it directly and immediately benefits the students in the school; and it lends itself—as the Court's opinion in *Lemon* observed—to the inculcation of religious doctrine. 403 U.S. at 617-619. Testing is peripheral to education; it benefits principally third parties—such as state officials—who wish to evaluate the school; and it is totally nonideological.

Moreover, the administrative services which are made reimbursable by the New York statute are the kind which a private school might well discard if they were not required by state law. Modern pedagogic theory has questioned the usefulness of examinations, and there are many institutions of higher learning which have, in recent years, eliminated testing. Since the administrators of the New York educational system wish, *for their own benefit*, to have some objective measure of performance in schools under their jurisdiction, they continue to require that tests be administered.

Such a requirement could, of course, be implemented by having state officials administer the tests themselves

at locations provided by the State at state expense. The same could be done for student attendance and health records. State officials could visit all private schools each day to compile attendance rolls and could gather health information directly from parents of students. The New York legislature has obviously decided that this is too cumbersome and expensive a route.

The question presented by this case, therefore, is whether it is unconstitutional for New York to recognize that the imposition of these administrative tasks on the schools—mandated principally to assist state officials—should carry with it some reimbursement for the costs of their performance. We submit that it is entirely consistent with the First Amendment for a State to defray the cost of services performed *for the State's benefit and at the State's command* by a religious institution.

Assume, for example, that the State of New York decided to conduct an exhaustive census of its elementary school population and of the level of elementary education within the State. Such a survey could be made by sending state officials into each school to gather information. If, to achieve this goal, the legislature decided it was preferable to direct one administrator from each school within the State to come to the State Capitol in Albany with his records for a week-long session in which the information would be gathered, would it be unconstitutional for the State, by payment to the schools, to cover the costs of transportation, room, board and the services of the administrator for one week? The costs which are reimbursed by the present statute are essentially similar to those covered by the above hypothetical. They cover noneducative serv-

ices which are compelled by state law for the efficient administration of the State's responsibilities.

Accordingly, the mere fact that payments are made directly from the public treasury to private schools does not invalidate the New York statute. This Court rejected that "simplistic argument" in *Tilton v. Richardson*, 403 U.S. 672, 679 (1971), noting that it was repudiated as long ago as 1899 in *Bradfield v. Roberts*, 175 U.S. 291. It warrants similar disposition here.

II

THE STATE'S DECISION TO PERMIT SCHOOLS TO EXECUTE THESE ADMINISTRATIVE TASKS ON A REIMBURSABLE BASIS IS A LEGITIMATE MEANS OF AVOIDING "ENTANGLEMENT" AND REFLECTS "BENEVOLENT NEUTRALITY"

The irony of the decision below (and of appellees' contention) is that it will lead to *more* "excessive entanglement" between state administrators and religious schools than results from the Mandated Services Act. Under the state law, each school takes its own attendance, keeps its own student and personnel health records, administers its own examinations, and finally reports to the State. If the Act is invalidated, the only way that the State of New York can remove from the private schools the severe financial burden of these duties is to have them performed by state officials who are full-time state employees. The consequence would be that a state officer would visit the schools regularly—possibly every day—and would arrive at certain intervals to administer standardized tests.

This kind of daily supervision of religiously affiliated schools is exactly what the "excessive entanglement" principle was designed to prevent. State officials will

have to adjust their calendars so as not to arrive on religious holidays and will have to time their visits so as not to interfere with other religious observances. Other kinds of accommodations will have to be made by the schools and by the officials.

In *Walz v. Tax Commission*, 397 U.S. 664 (1970), this Court sustained an exemption of religious property from local taxation on the ground that it constituted "neither the advancement nor the inhibition of religion" (*id.* at 672) and that an exemption "creates only a minimal and remote involvement between church and state and far less than taxation of churches" (*id.* at 676, emphasis added). The Court noted that eliminating the exemption "would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes." 397 U.S. at 674.

The same is true here. The New York legislature has chosen, in this law, the route that is least likely to lead to the "intimate and continuing relationship between church and state" that the First Amendment forbids, *Lemon v. Kurtzman*, 403 U.S. 602, 622 (1971). If that law is invalidated and the legislature is compelled to send state officials into religiously affiliated schools to perform neutral, nonideological administrative tasks, the opportunities for friction and divisiveness are substantially increased.

CONCLUSION

The New York Mandated Services Act is sound in educational theory as well as constitutional principle. It leaves to the private schools the performance of tasks which the State wants to have done for the benefit of its administrators. And it recognizes that while it is uneconomical for state officials to perform these tasks directly, it is unfair for the private schools to bear the costs of their performance. Hence it reimburses the schools for those costs.

The judgment below should be reversed with directions to dismiss the complaint.

Respectfully submitted,

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